Medical Experts As Witnesses

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Reprint from December, 1938, issue of the American Journal of Surgery, 49 West 45th street, New York City. Thurston S. Welton, M. D., Editor-in-Chief. Reprinted by permission of above.

It is a debatable question as to when a witness becomes an "expert witness." Various rules have been laid down by learned text writers to determine this and Courts of last resort have been called upon to decide, but their decisions, like most legal adjudications, are not harmonious. In a general way, before one can qualify as an expert, it must appear that he has acquired some special knowledge or skill in certain lines, not generally possessed by the ordinary practitioner. Expertness may come from academic study, or from wide experience, or from the two combined. A reasonably safe working rule would be that where the question calls for the expression of opinion, evidence based on special study or wide experience, "expert" testimony is necessary. It is, of course, not limited to physicians or surgeons. There are "experts" in all lines.

Some years ago there was a celebrated case on trial in the Federal Court in New York, involving litigation by an electric company, transmitting electricity to Buffalo. The company engaged Dr. Henry Rowland, then Professor of Physics at Johns Hopkins University, as an expert. Some time after Professor Rowland had given this public utility the benefit of his expert knowledge and experience, differences arose between them as to the value of his expert services. The disagreement not having been amicably adjusted, Professor Rowland sued the electric company for $10,000, his fee as an expert. The great Joseph H. Choate represented the electric company, and the late William L. Marbury, Sr. represented Professor Rowland.

In Mr. Marbury's opening statement to the jury, he characterized Professor Rowland as "perhaps the greatest physicist in America." Choate put on his nose glasses and looked inquiringly at Marbury as if he were covering a great deal of territory. Professor Rowland, as plaintiff, then took the stand, gave his qualifications and the nature of his research, and described the value of his services in the case in which he had been employed. He was then turned over to Mr. Choate for cross examination. Mr. Choate's first question to Professor Rowland was, "Dr. Rowland, who, in your opinion, is the greatest physicist in America?" Without a moment's hesitation, Dr. Rowland answered, "I am." [1]

Some time later, at a Johns Hopkins dinner, Dr. Gilman, then President of the University, chided Professor Rowland for his lack of modesty on the witness stand. Professor Rowland in reply said that President Gilman failed to take into consideration a very important factor, which was that when he was put upon the spot on that occasion by Mr. Choate, he was under oath to tell the truth, the whole truth, and nothing but the truth. The Federal jury gave him a verdict for $9,000. Most doctors will probably be spared embarrassment of this type, but Professor Rowland was, at any rate, equal to the occasion.

This anecdote perhaps suggests the importance of self possession on the witness stand as a qualification for the expert witness.

Self possession, without previous preparation, will not of itself suffice. There are many other requirements. Learning alone is not enough. Let the expert witness always be mindful of the fact that he is being called on by the Courts to make a scientific contribution to the cause of justice, in an attempt to solve a disputed problem

between litigants. To be genuiuely useful, he must be impartial and just. He must avoid partisanship and all appearance of it. He must not be personally interested in the outcome of the litigation. However great the temptation to be enthusiastic over the side of the case on which he is employed, he destroys his usefuluess, and brings reproach upon his profession, if his zeal gets the better of his judgment. He must uever appear to be reluctant to make an admission which is favorable to the other side, if the facts warrant it. Truth and candor will make the testimony in other respects more likely to be accepted by Court or jury. An honest expert is useful to both sides, a dishonest one to neither.

The besetting sin of all experts is that they talk professional jargon to laymen (to judge or jury as the case may be). One must remember what a jury is—a cross section of the community, oftentimes gathered up at random from the highways and byways, from lists of taxpayers or registered voters, white or colored. Jurors are of all nationalities, and may be fishermen, clerks, storekeepers, cobblers or push-cart men. Some of them can hardly read or write, and many speak English most imperfectly. Some are without much understauding. The idle and those on relief are now seeking jury service, for the "per diem" involved, whereas the banker and business man are too often seeking exemption from jury service. Year after year new statutory exemptions are lobbied through the legislatures of the several States to exempt such classes as Federal, State and municipal employees, registration and election officials, school teachers and college professors, physiciaus, surgeons, dentists, ministers, lawyers, and active members of the militia. To the shame of Maryland, we must confess to a most iniquitous provision in our laws whereby anyone may purchase exemption from jury duty by making an annual subscription of ten dollars for the support of the State Militia. This law is used largely by baukers, insurance men and business men—our tin soldier jury slackers. The practical result of every exemption is to leave the State Courts with an inferior grade of juror. Hence all litigation which is capable of being removed (by reason of diversity of citizenship) is transferred from the State to the Federal Courts. The clerks' offices are suffering from loss of fees and costs. The raw material that is left available for jury duty is not always of the highest caliber. It is that residuum to which the expert speaks when on the witness stand. Heuce the importance of gettiug dowu to their level and addressing one's self to those men (and women in many States) in such language that they can understand a scientific situation by the use of terminology with which they are more or less familiar.

Conceded that science is oftentimes incapable of translation without the use of scientific terms. In such cases, the scientific description must be used, but only insofar as is absolutely necessary. Then it should immediately be translated, as completely as possible, into the language of the man on the street. In that way knowledge and special skill become helpful. Otherwise, the expert is often a useless and expeusive ornament. Parenthetically, I might say that lawyers are just as bad, if not worse, than medical men, in their use of technical terms.

What justification can the medical expert find for the following answer[2] (taken from an official transcript)?

(Lawyer) "Q. Describe in detail, what, if any, tests you made of the plaintiff, and for what purpose these tests were made?

(Doctor) "A. In addition to the usual complete physical examination, the patient had a complete blood count and phenolsulfonephthalein test of kidney function, and Mosenthal test of same, and estimation of the non-protein nitrogen and sugar content of the blood flow, and serological test for syphilis and X-ray of the kidney and culture of the urine; and urea clearance test, cystoscopic examination, and nose and throat consultation and Addis count and Rubins test."

Other pointers for the medical witness might be:

Avoid flippancy on the witness stand. Your profession is too dignified for jokes on such occasions.

Speak loudly enough to be heard, and slowly enough to be understood. Pause between question and answer until you are sure you understand what is asked, and then answer candidly, even if the answer is "I don't know." It will be refreshing to the jury to find a learned man willing to make

such an admission. They may then believe some of the other things which you have said. Robert M. Morse once asked the longest hypothetical question ever asked, twenty thousand words long, of Dr. Jelley, Boston expert on insanity, in the famous Tuckerman will contest in Suffolk Probate Court. The question concerning the testator's mental condition took over three hours to propound. Strangely enough, the answer comprised just three words, "I don't know."[3]

Be not too flamboyant, either in your dress or in your manner of delivery, Be courteous to counsel on both sides. The opposing counsel may not always be courteous to you. The best way to humiliate him for his rudeness is by extreme courtesy on your part. The jury will then be with you, and against him.

Lawyers try many tricks on experts. Their knowledge of medicine or surgery is often very superficial, but they can ask many seemingly simple questions calculated to confound you. They may have read a little medical literature for the occasion. They may have taken the names of late medical books on the particular subject, and then ask you if you are familiar with this or that author. Perhaps you are, perhaps you are not. Note the word "familiar." You may know there is such a work. You may have read certain chapters in it in which you were interested—and yet you may not be "familiar" with the work as a whole. If not, do not hesitate to make it clear. There are hundreds of late law books with which they are not familiar, and of which they have never heard. Some are "familiar" with none—they practice by ear. In a State where examination for admission to the Bar was conducted orally in open Court, I once heard the son of the then Governor being questioned on international law. He was asked what authors he had read on that subject, and named Grotius and Vattel. The presiding examiner then stroked his long white beard and said, "I suppose you would concede Krupp's Foundry to be a pretty good authority on international law, would you not?" The student replied, "Yes, sir, I have read part of that work, but I cannot say that I am familiar with it as a whole." Whereupon they moved his admission to the Bar.

May I append Woldman's description of the Medical expert on the witness stand:

"With an erudite profundity,
And subtle cogitabundity,
The medical expert testifies in Court:
Explains with ponderosity
And keen profound verbosity
The intricate nature of the plaintiff's tort.

"Discoursing on pathology,
Anatomy, biology,
Opines the patient's orbit suffered this:
Contusions of integuments
With ecchymose embellishments.
And bloody extravasation forming pus.

"A state of tumerosity
Producing lacrimosity,
Abrasion of the cuticle severe,
All diagnosed externally,
Although he feared, internally
Sclerotic inflammation might appear.

"The jury sits confused, amazed,
By all this pleonasm dazed,
Unable to conceive a single word.
All awed, they think with hated breaths
The plaintiff died a thousand deaths—
What agony and pain he had endured.

"But then the counsel for the defense,
Devoid of garrulous eloquence,
Asked, 'Isn't it true that all you testified
Means merely from a punch or two
The plaintiff's eye was black and blue?'
'Yes, that's correct,' the doctor meekly
sighed."[4]

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(1) This incident in the trial is authenticated by a letter to me from Mr. William Lee Rawls, a partner in the firm which Mr. Marbury was the senior member. Mr. Rawls also participated in the trial.

(2) Medical deposition taken in Baltimore, Maryland, September 12, 1938, for Supreme Court of New York in Liggett Drug Store Case.

(3) Courtesy of Jad's Service, Cleveland, Ohio. (5 Ohio Law Reports 45.) Baltimore Daily Record, September 20, 1938.

(4) "The Expert Witness," by Albert A. Woldman, Docket, January 1933. (West Publishing Co., St. Paul, Minn.)

Reprinted from
THE DAILY RECORD,
Baltimore, Md., January 4, 1939.

WHAT IS CONTEMPT OF COURT?

Criminal Court Of Baltimore

Filed December 29, 1938.

STATE OF MARYLAND
vs.
ROBERT FREEDMAN
(Manager Sun Taxies).

Paul C. Wolman and *Stewart Lee Smith*, *Assistant State's Attorneys*, for the State.
Edward L. Ward, attorney for the respondent.

CITATION FOR CONTEMPT OF COURT.

EUGENE O'DUNNE, J. (orally)—

Well, gentlemen, may I say this, that I don't want the impression to be created that there is anything "high-hat" about either myself, or about any member of the Bench, as to his own personal sensitiveness about activities or contacts. We are all public officials, engaged in the performance of public work, which we strive to do as best we know how. Never in the history of this country did the country stand more in need of having a wholesome respect for the untrammeled and untainted administration of justice than it requires today. Today there are *isms* all over the world among other nations, with no respect for the administration of justice in some countries, with no confidence in the freedom from coercion of their judiciary. There must be a wholesome respect created and maintained by the ministers of justice in this country. We must impress, not only our American citizens, but our foreign population and our unnaturalized membership, that justice in this country is free from outside interference. Otherwise it will be a sad day when the public respect for our tribunals is found lacking. It is for this reason that I think Courts cannot be too scrupulous in maintaining public confidence in the fact that when cases get to the Courts that they there are free from all outside interference and are affected only by what happens across the trial table, and from the witness stand, under oath, before a jury of their peers, a jury unwhispered to, untouched, and uncommunicated with and uncontaminated by improper influences. To my mind that is the importance of this lesson. It was *impertinence* of the manager of a large corporate taxi industry in this community, with a long array of able counsel such as he has named, to write the trial judge direct; not taking the trouble to communicate over the phone, or in any wise, with any of his legal staff, as to whether there is or is not any impropriety in calling in a stenographer and dictating his opinion about a man who is coming before a particular judge at 10 o'clock the following Tuesday morning, for trial under an indictment found by a grand jury. I say it shows a great lack of respect for the institutions of the State, for a commercial house to undertake to have direct communications of that kind pertaining to public business and not do so through the medium of lawyers, who are the proper representatives and agencies in contacts with the Court for the orderly presentation of such communications as may be required between industry and public justice.

I say that this letter, to my mind, is an insidiously written letter, so insidious that even as able counsel as Mr. Ward didn't seem to be able to satisfactorily interpret it himself. But I think the ordinary man on the street, unaffected by the subtleties and technicalities of the law, would not hesi-

tate a minute to say that the writer of that letter believed in the innocence of the man on whose behalf he has written, and that he was trying to convey that impression to the Judge, that he so believes.

I say it was a piece of ill-considered, impertinent commercialism not to take the trouble to find out where it was addressed, and to leave it to his stenographer, in her judgment, to communicate with the judge at his private home, or at the Court House, as she saw fit.

I wasn't overly impressed with the candor of his testimony on the witness stand when he professed that, although managing a big taxicab company of 750 drivers for four years, he wasn't quite sure he might not get confused as to whether the Court House was up on Cathedral street or down town! Now if we are asked to believe that kind of testimony, it doesn't commend itself to my conception of credibility. I think he now realizes he made a gross mistake, and that he didn't get across the bar of justice the impression that he sought to convey.

The impression *I* seek to convey to the whole community is simply this: That everybody in the State of Maryland must have abiding confidence in the fact that when they fall into the hands of the law, they can find "*sanctuary*" in the Courts, and that neither their enemies, nor witnesses, can reach across yonder rail and stab them in the back, and that the only way they can be hurt or harmed thereafter is by sworn testimony under oath from that witness stand, before a jury selected by them, or before a judge engaged in the trial of their case. Even the felons under the early English law, who could be pursued and shot and killed at sight, could always find "*sanctuary*" in some church or monastery for forty days, against the attack of the barbarian, or the outlaw, or even justice itself. They were afforded a breathing space to get their second wind, until they decided that they were out of the running, and opportunity was afforded them to collect their senses, and decide what they were going to do. Then they either had to *abjure the realm*, and take passage for foreign countries, and become self-banished defendants, or they had to (inside of forty days) surrender to the civil tribunals or the criminal tribunals for trial *according to the law of the land*. The Court house today is the embodiment of that right of *sanctuary* in English history. When a man is once indicted, and there is a *case pending*, not even the powerful press can hurt him. The press is just as liable to be in contempt of Court if it seeks by innuendo or published articles to disseminate any information the effect of which would be to stab him across the bar of justice and to prejudice his trial in the community. It also becomes amenable to the same law of protection of the accused that is applied to this defendant, and any other defendant. He who seeks to reach across that bar, by mail, by word, by published information of any character, except on the witness stand, subject to cross-examination and testimony under oath, under the pains and penalties of perjury, for what he says, is in contempt of Court.

This respondent admits that he was familiar with a recent case, and read the newspapers, and knew that Lieutenant Hitzelberger of the Police force, was sent to jail by me in this Court for 60 days and fined for attempting to contact a single member of the grand jury through the wife of an intimate friend of his household. Some years ago we had the same thing in another similar case. Some member of the Elks Lodge, of which I am a life member, wrote a letter to me on a pending case. We handled it the same way as we are here, a citation to him, and so forth, and so on, and now those matters have become crystallized in the community. There is nothing new or novel about the fact that when a case is *pending*, it is "hands off" of everything, except through the lawyers, in the Courts, and according to the proper administration of justice. It may be said by some, well, I can remember in my boyhood when things weren't so strict, when the old regime applied, and you could go around to a police magistrate or talk to him at his house the night before the case was coming up for trial. I say if that be so, and if there were such an order of things at any time in this community, it is a very wholesome thing that it does not continue. Unless the slightest crossings of the bar are rebuked with stern severity, there is going to be laxity in the community. If this case doesn't do anything more than impress the public, which is the purpose of administration of justice, that regularity

and propriety are observed, it will stop taxi operators and any other commercial houses from thinking they can just freely sit down and dictate their correspondence direct to the Court, without the medium of a lawyer, and without the inconvenience of coming down and testifying, so that they can go and push their commercialism and attend the auction sales, and resell their stuff, and not bother with formal appearance in Court, and waste time taking the witness stand, they will just write the judge direct and tell the judge what they think about it, and let it go at that. I propose to stop that form of commercial impertinence.

I find the defendant guilty of contempt of Court, and the sentence is $100.00 fine, and that he be incarcerated in the Baltimore City Jail for three hours this afternoon (subject to the right of appeal, if such exists, and I hope it does).

Note—Cause Of The Citation.

The Manager of the Sun Taxi Cab Company wrote a letter to the Judge's home pertaining to a cab driver, Leroy Kennigan, who was under indictment for prostitution, etc., and whose case was pending before the Judge for trial the morning of the receipt of the letter. The burden of the letter was that the cab driver had told the Manager his complete story of the facts and that the Manager had entire faith in the truth of the statement of the accused.

Reprinted from
The Daily Record,
Baltimore, Md., January 3, 1939.

Remarks Of Judge Eugene O'Dunne, Toastmaster, Old Town Merchants Banquet, Lord Baltimore Hotel, Tuesday, January 3, 1939

The real object of this gathering is to pay a befitting tribute to your long-time President, Wilmer C. Carter, who is retiring to begin a career in the Maryland State Senate. That feature of the program will be handled by former Mayor William F. Broening. I will, therefore, leave it *exclusively* to him. (Presentation of a handsome silver service).

I could not get here in time for the banquet because of a lecture at the law school. I was told to merely introduce Governor Nice, Mayor Jackson and Governor-elect Herbert R. O'Conor, and to do so with such brevity and wit as I could command, but if I had to *choose* between them, to select *brevity*. This I accordingly do.

(Introducing **Governor Harry W. Nice**):

From recent press articles I note that the University of Mayland is adding new lustre to an old institution. One of its scientists has just discovered why we have blondes, and why human hair turns gray, and why the zebra is striped—to present a sport model of a jackass. The discovery is attributed to Dr. Figge. He may be a lineal descendant of the one who discovered the fig leaf in the Garden of Eden. If so, he can trace his ancestry further back than General John Phillip Hill on his recent return to *Franklin Farms*, or even further back than the local Baronesses of Runnymede!

Scientist Figge says it is all due to percentages of oxygen, which is a form of gas. We had long thought it due to *peroxide*.

Medical science has not yet told us why we have Governors, past, present and prospective. That may also be due to another form of gas. But, "as the hour grows late," we will not now indulge in scientific disquisition. Sufficient for the day is the *evil* thereof.

Recent dispatches from the Richmond Medical Convention herald the discovery of Dr. David I. Macht that infection from the venom of the deadly cobra will now enable the normal man to "see more out of the corner of his eye than he ever could before." That fact, with the scientific increase in the output of *blondes*, will be a great boon to aging humanity, especially to you "Old Town Merchants."

It is claimed that venom from the cobra also stimulates the intellect and enables it to do magical problems in *arithmetic*. If so, it may help Herbert O'Conor to balance Harry Nice's budget! Perhaps Mayor Jackson and Walter Graham, of the Board of Estimates, might like to take a shot at the same time.

Governor Harry now comes back to us after a brief interlude of four years, as the same large-hearted boy he was before he went wandering. We have missed him in the Courts. We often needed his tears to add drama and pathos to the sordid scenes of daily life. Like him, I too was once a "criminal lawyer," and if not more often retained, it was due to lack of clients or lack of tears. There is a State Supreme Court decision * which holds that it is not only the constitutional *right* of a lawyer to shed tears before a jury, but sometimes even his *legal duty;* one in which Harry has never failed, if the fee also covered *tears*. That was always $300 to $500 *extra*. He is in the prime of his professional life, if not of his political career. I want him to speak to us with a tremulous voice embellished by Biblical quotations.

Old friend Harry tells me he has just completed an inventory of all the silverware in the Mansion House, and that he is leaving the complete *inventory*, and *most* of the silver. Also that he has full statistics of all the inmates of all the penal institutions of the State, and that even after his next

* Ferguson vs. Moore, 98 Tenn. 342.

Friday press release of Pardons and Paroles, there will be left at least one perfect specimen of every grade of crime known to Jim Hepbron, or to the Criminal Justice Commission, and that Commissioner Boyd will still have material sufficient to occupy him for the rest of the term.

I had a man before me last week iu the Criminal Court who said that the last place he worked was at the "resurrection house." He meant Mayor Jackson's recreation pier at the foot of Broadway, but we all thought he meant the "Mansion House"—as the only resurrection house of which we had any knowledge. Governor Nice has now made it entirely fit for a Democratic Governor to occupy. More power to him.

As the hour grows still later, I now present to you the hero of the "resurrection house," *Honorable Harry W. Nice*, retiring Governor of Maryland.

II

(Introducing **Mayor Howard W. Jackson**):

I now rise to present to you a true and tried public servant. I want to say that he is even *more* than that. He has shown the fine public spirit of a real hero. No one who has so long cherished the ambition to be Governor of Maryland, and who came as close thereto as Howard Jackson did, can adequately measure the keenness of disappointment resulting from popular elections. The test of character is often found in a man's action under the stress of disappointment. At the Chicago National Convention some years ago, we had an exhibition of that. Did the aspiring candidate whose hopes were not there gratified come to the front and support the victor—on the sidewalks of New York? He put his brown derby on, left the convention, and first sulked in his own tent, and then went over to the camp of the enemy and knifed those who had been responsible for his past political preferment. Not so with Howard W. Jackson. At the Auditorium Convention Hall, he sat side by side with the victor and pledged him his full support and that of his constituency, and later delivered the goods. It took stamina, stout heart and manhood of a high order to do that, and he did it. The community loves him all the more for it, and will later testify its affection in some substantial way. *Howard W. Jackson!*

III

(Introducing **Herbert R. O'Conor, Governor-elect**):

This is a banquet of Old Town Merchants—of all creeds and of all political faiths. It is in no sense a political gathering. It is a civic organization, a commercial group, interested in the general welfare of City and State.

Public conditions touch every home in the business life of a great commuuity. Perhaps never in the history of our State was any Governor elected so wholly free from political obligations and partisan promises. With such a splendid opportunity for the efficient discharge of public duty, great things may rightfully be expected. He is in the prime of life with a large experience behind him. The press and public are with him today. Romance of the higher order is on the air. Not the least of the public hopes is for a new order of Police Magistrates iu City and State. The cry of distress is louder in the counties than iu our City, because there they have had greater power, and a wider jurisdiction, and have oppressed the poor and the defenseless. The public debt of the State is appalling; necessity for public relief grows greater. Extravagance in government touches the now pinched purse of the poor.

Governor O'Conor is most fortunate in having so closely allied with his success a man of large experience in financial fields, Howard Bruce, who has given unstintingly of his time and talents, not only in systematic organization and direction of Community drives and their expenditures, but also in other civic movements calling for a high order of financial talent. Much is expected of both of them in this hour of nced. Great are our hopes and expectations.

With a sublime confidence that they will be fully realized, and that we are embarking on an administration that will be second to none even of Governor Ritchie's finest administrations, I now present you to your next Governor, the Honorable *Herbert R. O'Conor!*

Reprinted from
THE DAILY RECORD,
Baltimore, Md., January 6, 1939.